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CONTAINING

CASES DETERMINED BY THE CHIEF COURT OF THE PUNJAB AND THE FINANCIAL COMMISSIONER, PUNJAB, AND OTHER LEGAL MATTERS.

EDITED
BY

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THE
Punjab Law Reporter.

Unreported Judgments of High Courts.

The following para. has appeared in the Calcutta Weekly Notes, dated the 11th March 1901.

We invite attention to the decision of the Chief Justice, Banerjee and Brett, JJ., in the case of *Mahomed Ali Hossein* v. *Mir Nazar Ali*, reported at p. 326 of this issue to the effect that unreported decisions of the High Court are as much authoritative as those reported in the authorised reports. The reasons given by the learned Chief Justice will fully appear from pp. 328-329 of the reports. Our note in this connection at 4 C. W. N. cclvii (257) also the note in our original prospectus, which was submitted to the late Chief Justice at his request, preliminary to our obtaining sanction to privileges similar to those enjoyed by the reporters of the authorised reports, may also be referred to.

It appears that the publishers of the Weekly Notes, Calcutta, have been able to secure privileges similar to those enjoyed by the reporters of the Indian Law Reports. We have been advised by our supporters to apply to the Chief Court for similar privileges, but not being sure that our

request would be granted we have refrained from doing so. We have learnt that before we started this Journal applications were made with a like object but they were not favorably considered.

A large sum is spent in obtaining copies of judgments which, if we could save by the privileges being granted to us, would be spent in improving the journal.

The circular of the Chief Court which permitted subordinate Courts to refer to the cases published in the Law Reporter is unhappily so worded that some Judges have thought fit to discourage its purchase. But the result fortunately has been quite the reverse. The practitioners have applied to us for certified copies of the judgments reported by us for the satisfaction of those Judges, who have thus unintentionally rendered us useful service.

We quote the following from the judgment of Sir Maclean referred to above.

'A judgment is none the less an authority because it has not been reported, otherwise the question of whether or not a judgment could or could not be regarded, would depend upon the mere whim of the Reporter.'

The Chief Justice referred to section 3 of Act XVIII of 1879, which Sir Maclean observed 'was framed to constitute a monopoly, if the Judges so desired, for the authorized reports' but 'it does not prevent the Court from looking at an unreported judgment. *This has always been done and can and ought to be done.*'

We hope the Judges of the Chief Court will some day give a similar ruling. We intend in some future issue to detail the undesirable consequences of the monopoly allowed in this province.

THE ADOPTION OF DAUGHTER'S SON IN THE PUNJAB.

(*By Mian Muhammad Shaffi, Barrister-at-Law.*)

In 1893—some 44 years after the annexation of this province and over a quarter of a century after the establishment of the Punjab Chief Court—a Full Bench decision of the Court (No. 50, P. R., 1893) declared the adoption or, to speak more accurately, the appointment as an heir of a daughter's son *prima facie* invalid and opposed to the customary law of the land. As an immediate consequence of this ruling, the current of judicial decisions was entirely changed and the tide, hitherto favourable to the daughter's son, completely turned.

After discussing some of the previously published rulings of the Court recognizing the validity of such adoptions and referring to the entries in certain *Riwaj-i-ams* with reference to this matter, Sir Meredith Plowden proceded to observe (P. 230). "But I think that the records of custom and the knowledge derived from other sources since 1874 as to custom generally, warrant us in saying that, generally, by custom among landholding tribes, who permit adoption in the Punjab, the adoption of a daughter's son in presence of near agnates of the adoptor presumably needs their assent." The learned Senior Judge then went on to discuss certain features of customary law—incidental to the *theory* of strict agnatic succession—and to enlarge on the nature of the customary power of adoption. The view of the question finally taken by the learned Judge is thus expressed (P. 233): "I think, therefore, that we are fully warranted in holding generally—creed, tribe and locality apart—that when a sonless man in any landholding group which recognizes a power to adopt, asserts that he is competent to adopt a daughter's son or other non-agnate in presence of near agnates, irrespective of their assent, the presumption at the outset is against the power" * * * * Mr. Justice Rivaz and Mr. Justice Benton, the other members of the

Full Bench, expressed most briefly their concurrence with the judgment of the Senior Judge.

The ruling under notice is of such vital importance to the agricultural communities in this province and its consequences so far reaching that it seems extremely desirable to discuss the question at length in order to test the soundness of Sir Meredith Plowden's opinions. The matter is capable of being looked at from the point of view of abstract reasoning as well as of proved facts.

The existence of the institution of adoption of a son by a childless person is, in this country, traceable as far back as history can reach. Of a certainty the institution is even more ancient than the Dharma Shastra of Manu. The adoption of the Hindu Law was not only for "the celebration of name and the due perpetuation of lineage" but, primarily, to prevent a failure of the obsequies. And in earlier times when the adoption of a son had not assumed the important position in Hindu Law which it ultimately did in the time of the great law-giver Manu, the want of a son amongst the Aryans was amply met by the early Hindu Law providing twelve kinds of sons for the sake of "the funeral cake, water and solemn rites". Foremost in the rank of these stood the *son of an appointed daughter* who for religious purposes, occupied a position *exactly equal to that of a natural son* (Mayne's Hindu Law and Usage S. 93). The restrictions upon the selection of a person for adoption are of Brahmanical origin and, as regards the adoption of daughter's son, the later authorities are at variances. As regards *Sudras* there can be no doubt that the adoption of a daughter's son amongst them is *not only valid but enjoined* (Mayne Ss. 123-124). Amongst the three regenerate classes such an adoption is, according to Mr. V. N. Mandalik, a valid one, while Mr. Sutherland, the two Mac Naughtens and both the Stranges state the contrary rule. The ruling of their Lordships of the Privy Council in *Bhagwan Singh and others versus Bhagwan Singh minor and others* (I. L. R., 21 All., 412) declares such an adoption, amongst the three higher classes, as opposed

to Hindu Law. It is, however, worthy of note that the arguments before their Lordships were all one-sided, the respondents not being represented— a disadvantage which was admitted by their Lordships themselves during the course of their judgment (P. 417). And after going through the judgment carefully, one cannot help feeling that the treatment of the question by their Lordships is not such as to produce a complete conviction of the incorrectness of the very elaborate judgment of Sir John Edge concurred in by the majority of the Allahabad Full Bench whose decision was reversed by the Privy Council. It might here be mentioned that the view of the matter taken by the Allahabad Court was accepted as correct by a Divisional Bench of the Chief Court in No. 97, P. R., 1898.

Apart from the rule of Hindu Law, which is not uniform as regards the various castes into which Hindu society is divided and with reference to which there is considerable divergence of opinion, it is undeniable that the practice of adopting a daughter's son has obtained a considerable hold on the people throughout the country. Such adoptions are recognized amongst Jains (Mayne, P. 144; I. L. R., 8 All., 319), and are undoubtedly very common amongst the Brahmans of Southern India (Mayne, P. 144; I. L. R., 9 Mad., 44) as also amongst the Nambudri Brahmans of Malabar (Mayne, P. 145). A similar custom prevails amongst Bohra Brahmans of North-Western Provinces (I. L. R., 14 All., 53). And the case of Gurdial versus Badri Dass, No. 1227 of 1874 (noticed at P. 129 of Messrs. Boulnois and Rattigan's "*Notes on Customary Law*") is a remarkable illustration of how Brahmans living in such a sacred religious place of the Hindus as Thaneswar had taken to the custom of adopting daughter's and sister's sons. These and various other cases, which it is unnecessary here to detail at length, clearly demonstrate the general prevalence of of the custom sanctioning the class of adoptions now under notice—*even amongst the priestly class* of the Hindus.

Turning to the rules of inheritance as ordained by the laws of Islam, we find that a daughter is a sharer along with the sons and the share of a daughter, where there is no son, is one-half, the collective share of two or more daughters being two-thirds of the father's estate. And as the legal share of the widow may, for all practical purposes, be regarded as one destined for the daughter in such cases, the greater portion of the father's property thus descends to her under the Muhammadan Law when the proprietor leaves no sons. Moreover, in the absence of certain other relations, whose number is very small indeed, she may be entitled to the whole of her father's property. It is clear, therefore, that the daughter and her descendants occupy a highly favoured position under the *Shara* and any custom which would result in the property of the father descending to her or her children would be highly acceptable to the religious instincts of the Musalman tribes in the Punjab. And this becomes still more clear when we remember that the Punjab Muhammadans practise endogamy and, for that reason, the feeling in favour of such adoptions amongst them would naturally be an intense one—the daughter's son not being looked upon by them as a "stranger."

Amongst the non-agricultural classes in this province the adoption of a daughter's son is recognized as proper (Rattigan's Digest, S. 37 (a); No. 97, P. R., 1898 at page 347). It is, therefore, highly interesting to find out whether the Full Bench decision under notice holding as it does, contrary to all the previously published rulings, that the custom is, *prima facie*, just the contrary amongst agriculturists is based on proved facts brought to light during recent years or is it but the outcome of a highly interesting theory, conceived and developed, by a deep-thinking, mature, and ingenious mind.

In the origin of custom, sentiment must undoubtedly have played a considerable part. In primitive conditions, the influence of the elders of a community or its various sections was unquestionably almost unlimited and whatever they ordained as the *Dastur-ul-Amal* of

the tribe was invariably followed by its members. And what was the guiding force in the minds of these elders which might be considered as the fountain-head of the directions or opinions, call them by whatever name you like, which resulted in the adoption by their followers, of the rules of conduct they prescribed? When we remember the condition of things prevailing in those days, when we recollect that men's minds were not then disturbed by such complex political considerations and intricate reasoning as are peculiar to these days of modern civilization, the only answer to the above question which must force itself on the mind of an impartial thinker, unprejudiced by pre-conceived ideas, must be that the rules prescribed by the elders in those days must be attributed to sentiment aud natural instinct. That being so, what more natural for a human being than the wish to do everything possible for his children. Such a desire cannot, in the nature of things, be confined to any particular stage of civilization but must exist in men's minds in all stages of development And as daughters are just as much flesh of one's flesh and blood of one's blood as sons, the first wish of a sonless owner would instinctively be to shape matters so as to enable his daughters and their progeny to inherit his property. There is nothing extraordinary or unusual, therefore, in supposing that in ancient times tribesmen should have, by common consent, adopted as a rule of social life a custom which would, in the absence of sons, secure their heritage to their daughters and daughter's children. Such a custom would be consonant with reason and would in no way be contrary to justice, equity and good conscience.

One of the fundamental principles governing the validity of every custom is the well-recognized rule that it must be "*ancient and invariable*" (Rattigan's Digest of Customary Law S. 1, Cl., (d) and the authorities cited thereunder). We must, therefore, endeavour to find out what was the custom with regard to the adoption of daughter's son in the period preceding the British rule in the Punjab. And it may here be remarked that this

important aspect of the question is left untouched in the Full Bench decision under notice. The main, nay, the only function of the Courts *qua* matters customary is to find out what is the rule of custom governing the question before them and after ascertaining the same to duly apply it to the facts of each case, unless there exist any reasons going to the root of the validity of the custom. It would be going utterly beyond its proper function for any Court to, so to speak, enact a custom for the people instead of confining itself to finding it out from proved facts.

Looking at the question, then, from this most important point of view, it is significant that neither in No. 50, P. R., 1893 nor in any of the subsequent rulings in which the Full Bench judgment has been followed has there ever been, on the part of any learned Judge, the slightest attempt to prove, on the authority of any contemporary historian or of any decided cases, that the custom of adopting daughter's son did not obtain amongst the Punjab agriculturists in the period preceding the British rule. On the other hand, several authorities can be cited to the contrary. In the very elaborate judgment of the late Senior Judge in No. 50, P. R., 1893 itself, there is to be found abundant evidence of the correctness of our contention in this respect. Of the list of published decisions bearing on the adoption of daughter's and sister's sons given at pages 226 and 227 of the judgment, seven were cases in which the adoptions had been made during Sikh times and had been upheld as fully warranted by the usage of the people in those days. (See Nos. 19 and 26, P. R., 1872; No. 66, P. R., 1881; No. 129, P. R., 1882; Nos. 1 and 50, P. R., 1875; and No. 120, P. R., 1885). In several of these cases the result was arrived at after careful enquiry on remand by the Chief Court. And there must have been a large number of cases decided by the Punjab Courts during the early years of the British rule in this province with a similar result—cases which did not come up to the Chief Court at all or in which, if they did reach that Court, the judgments

remained unpublished. This establishes beyond doubt the force and the truth of Mr. Justice Powell's observation in No. 154, P. R., 1884 that '*indeed there can be little doubt that the adoption of the daughter's son was one of the most ancient forms.*"

Coming to the British period we are at once confronted with the remarkable fact that up to 1893, through an uninterrupted period of 40 years, we find authorities almost unanimously in accord in holding that custom in this province regards such adoptions perfectly legitimate and warranted both by the feelings and the practice of the people. We are not in a position to trace the decisions of the Punjab Courts previous to the establishment of the Chief Court in 1866. The Punjab Civil Code, however, shows that such adoptions were in those days, fully recognized. (See No. 50, P. R., 1874 at P. 185). From that year onwards up to 1893 there are scores of published and unpublished judgments of the Chief Court itself fully recognizing the validity of such adoptions. In No. 50, P.R., 1893 Sir Meredith Plowden himself points out 11 reported cases of adoption of daughter's sons and 8 of adoption of sister's sons amongst Jats alone in addition to those cited in No. 50, P. R., 1874. And here it may incidentally be remarked that one would have thought these remarkable figures *by no means exhaustive in themselves*, were sufficient to justify the exclusion of, at any rate, Jats from the sweeping proposition finally laid down by the Full Bench. We have gone through the various volumes of the Punjab Record up to the year 1893 and, as a result, we find 27 published cases in which adoptions of daughter's sons were upheld as justified by the customs of the people as against only 3 in which such adoptions were held invalid. Sir William Rattigan, in the note to section 37 of his Digest of Customary Law, cites 40 reported and unreported cases in support of the customary appointment as heirs of daughter's sons. *It is significant that Sir Meredith Plowden himself was a party to some of these decisions* (*e. g.* 167 of 83; 102 of 85 ; 20 of 86). And if we were to add to these cases decided by the Chief Court itself which have remained unreported altogether, either in the Pun-

jab Record or in any other publication, and cases in which the decrees of original Courts were not appealed against or the appeals were finally disposed of by Divisional and District Courts, figures would, no doubt, assume enormous proportions. Moreover, against every contested adoption of this kind there must have been several which were not questioned by reversioners either because of the inward conviction of their validity or some similar cause.

The existence of the institution of *Khana damadi* and the validity of gifts in favour of daughters in some tribes furnish additional arguments in support of the adoption of daughter's sons. It has been, on various occasions, ruled by the Chief Court that in such cases it is the male issue of the daughter that is really intended to be benefited (Rattigan's Digest, S. 27; No. 22, P. R., 1893; Roe's Tribal Law, para. 42, page 82). It follows therefore, that the tribes permitting gifts in favour of daughters or the succession of khanadamads would naturally recognize the validity of the adoption of a daughter's son.

It is upon these grounds that we confidently contend that from the earliest times till the year 1893, the "ancient and invariable custom" of the province fully justified the adoption by childless proprietors of their daughter's sons. And the strong hold which this rule of custom has on the people is rendered manifest by the undisputable fact that in spite of this sweeping decision of a Full Bench of the Chief Court ever so many cases of such adoptions are being brought to light by litigation (See Punjab Record 113 of 93; 3, 30, 34, 39, 86 of 94; 19, 47, 53, 58, 71, 84, 103 of 95; 6, 25 of 98; 18 of 93; 2 of 99 (R); 33, 81 of 1900, &c.) in some of which such adoptions have been even now held valid (2 of 99 (R); 25 of 98; 34 of 99; 71 of 95). And an impartial examination of those in which the then disputed adoptions were set aside would reveal the fact that the *ratio decidendi* of these cases was practically the initial presumption against their validity laid down by No. 50, P. R., 1893. Sometime ago the writer was engaged in defending a gift made

in favour of a daughter's son by a childless proprietor who had kept the boy's mother in his own house after her marriage and had brought up the boy as his own son. Besides various judicial precedents in favour of such alienations, there had been, in the village of the parties alone, 6 cases of similar gifts which it was impossible even for the reversioner plaintiff's witnesses to deny. One of the witnesses for the plaintiff, who had stated that such a gift was contrary to custom, was, in cross-examination, asked about each of these 6 alienations in his own village and admitted that they had actually taken place and had been recognized. "If so why do you say such gifts are contrary to custom," was the next question put to the witness. The significant reply was "Yes, our custom used to regard alienations in favour of daughter's sons favourably, but the Chief Court has recently declared them invalid and, therefore, I say they are now invalid." This is a typical instance of the feeling now existing throughout the country with regard to certain rulings of the Chief Court and the real truth is that while custom has always recognized the validity of such adoptions, the highest Tribunal in the Province has, for reasons best known to the two learned Judges who created a revolution in the customary law of the land, enacted a diametrically opposite rule for the people to follow instead of merely confining itself to its legitimate function, *i. e.*, finding out what is the custom prevailing amongst the people and, having ascertained it, to apply it to the facts of the particular case before the Court. "In our opinion," said Mr. Justice Robertson and Mr. Justice Maude, in Civ. Ap. No. 1390 of 1897, "the true spirit of tribal custom is neither more nor less than the custom which is proved to exist, and we should not in coming to a conclusion on this point be swayed too much by general theories on the subject."

Again, let us, for a moment, take into consideration the comparative experience of agricultural affairs and knowledge of the customs and manners of the people possessed by the Judges who were parties to this

long series of cases before 1893. Comparisons are, no doubt, often odious, but in matters of importance such as the one under consideration they are occasionally unavoidable. It is needless, in this respect, to refer to the three learned Judges who constituted the Full Bench in 1893. One can easily form an opinion as to their knowledge, derived from first-hand sources and personal observations, of the customs of agricultural communities in the Punjab. On the other hand, we have Messrs. Smythe (who it is well-known and recognized at all hands had an exceptional acquaintance with the social life and the customs of the Punjab agriculturists), Boulnois (Joint-author of "Notes on Customary Law"), Baden-Powell (author of "Indian Village Communities"), Burney, Lindsay, Rattigan (author of "Digest of Customary Law in the Punjab") &c.,—gentlemen whose opinions were not the results of so-called tribal Law theories formed after much elaborate thought, but were based on practical knowledge and vast experience of the life, customs and practices of the people—all holding unanimously the view we contend for, *i. e.*, that custom in the Punjab regards the adoption of daughter's son with favour.

"But," says Sir Meredith Plowden, "I think that the *records of custom* and the *knowledge derived from other sources since* 1874 as to custom generally warrant us in saying that * * * the adoption of a daughter's son in presence of near agnates of the adoptor presumably needs their assent."

A word about these "records of custom." In the first place, on an examination of these we find that those of Hoshiarpur (34 of 99), Shahpur (Customary Law Series, Vol. XV, P. 59), Amballa (Ibid, Vol. X, P. 25), Sialkot (Ibid, Vol. XIV, P. 22), Karnal (Ibid, Vol. VIII, P. 16), Gujrat (Ibid, Vol. IX, at P. 5), Lahore (Ibid, Vol. XIII, at P. 12 as regards Arains), Amritsar (as regards Rajputs see No. 39 of 95 at P. 113), Ferozepore (Roe's Tribal Law, P. 73) and Kangra, Gurdaspur, Delhi, Jullundur, Guj-

ranwala, Jhang and Rohtak (Ibid, page 74), support the adoption of daughter's sons. And as regards entries in some of the records of custom which expressly lay down that a daughter's son cannot be adopted, it would be most interesting to enquire whether, really and strictly speaking, they represent the spontaneous expression of their feelings and ideas by the people themselves or whether they are the outcome of the Settlement Officer's personal views as to what the custom ought to be. " But where the Settlement Officer," says Sir William Rattigan, " charged with the preparation of such records, has 'shaped public opinion on most questions in the direction in which he himself and others of longer experience thought equitable', as Mr. Thorburn candidly acknowledges he did in the Bannu district, the value of entries purporting to expound local Customary Law is obviously reduced to zero. And, it must, I fear, be added, that in the settlement records of other districts also, although we may not have similar candid avowal with respect to them on the part of Settlement Officers such as Mr. Thorburn supplies, identical influence would nevertheless explain many of the most dogmatic statements of alleged customs which occur in them, for which no precedents are cited and for which, probably, none would be found to exist." These, it must be borne in mind, are the words of one whose opinions as regard questions relating to custom must carry the greatest weight founded as they were on exceptional and unique knowledge and experience of these matters. Of all the *Riwaj-i-Ams* framed at the various Settlements in the Punjab, there is, we venture to assert, not one which while declaring the adoption of daughter's sons invalid by custom supports that declaration by any precedents of such adoptions having been set aside either by force of public opinion or by judicial decisions before the year 1893. In short, in the words of the learned originator and author of the Customary Law Series " but now generally a man is allowed to adopt a person related to him through a female such as his

daughter's son." (Hon'ble Mr. Tupper's "Punjab Customary Law, Vol. II, P. 111-112).

As regards "*the knowledge derived from other sources since* 1874 *as to custom generally*," vaguely referred to by the late Senior Judge in the passage cited, we are not in a position to properly gauge its value for the simple reason that the learned Judge has not been pleased to state what that knowledge consisted of and what were the sources from which it was derived. If the learned Judge referred merely to the features imparted to the customary law of the land by the modern theoretical development of the principle of strict agnatic succession—a development which began to assume definite shape soon after Mr. Justice Roe came to the Chief Court—all we can say is that these "sources" are not traceable in the feelings of and the actual practices and customs in vogue amongst the illiterate masses but might exist in the fertile brains of highly—cultured, able and thoughful personages.

On the other hand, if one who himself belongs to the agricultural class, who, because of his connection with various social, political and educational movements in the province, has had special opportunities of acquiring knowledge of these things, who because of his professional experience, both in the mofussil and at head-quarters, has had peculiar advantages of observation and study, might be permitted to venture his personal opinion and to express the result of his somewhat long and careful enquiries, the writer emphatically denies that there is anything in the customary law of the land which is opposed to the adoption of his daughter's son by a childless proprietor amongst the agricultural communities of the Punjab who recognize the custom of, and practise, adoption. On the other hand, as a general rule, such adoptions are not only countenanced but looked upon with favor and are perfectly consonant with the feelings and wishes of the people. The tribes which are opposed to such adoptions are very few indeed and being exceptions only prove the rule. It is,

therefore, respectfully submitted that the principle underlying the Full Bench decision reviewed in this paper is far from being sound, that the Chief Court should re-consider the question and, in accordance with a long series of decisions prior to 1893, the initial presumption ought to be in favor of such adoptions and the onus of proof should, as a matter of pleading and apart from evidence, be placed on the party who asserts the invalidity of such adoptions.

LIST OF CASES REPORTED.

INDEX.

TO SUBSCRIBERS.

We have received a number of complaints from the subscribers that they have not received Parts IV for February and March 1901. It is to be stated that some of the Reports even for February have not been received up to date. To avoid delay in future it is under contemplation to alter the arrangement of Part IV with a view to supply only monthly digests of all cases published in reports that are received in time. Cases received late for publication will be inserted in the following month.

quoted. I am unable therefore to accept it as a fair assumption against an executive officer in Mr. Mukerji's position that "such divinity doth hedge a Gazetted Officer," that his story must be assumed to be false when he says that he feared, and had good reasons to fear personal violence. Further it does not appear from the file that the Biloches were aware whether the accused was a "Gazetted Officer" or not.

Let us now, giving the accused the benefit of the only assumption proper to make, *a priori* in a criminal charge, *i. e.*, that he is innocent until proved guilty, proceed to consider whether or not the extremely *a priori* improbable story of the prosecution is proved to be true or not.

That story amounts to this—that the Biloch camel drivers did nothing more than humbly entreat the accused, a member of a race utterly despised by such races as the Biloch camel men of the Marjalla, and believed by them to be by no means likely to possess qualities of extreme physical strength or courage, that the accused refused to listen to their entreaties, that some how or other in some mysterious way the man under arrest who had failed to effect his escape before became able to do so without assistance during their entreaties. That the accused threatened to shoot if they did not desist, that they thereupon ran away, and then the accused got deliberately out of the tonga, fired first one shot which missed, and then went forward to get a more favourable position, fired again and shot his man. It is not necessary to discuss the truth of this story for both the Lower Courts have agreed that the story of the two shots is an untruth—as indeed it obviously is. The Biloches, who knew perfectly that they had been entirely in the wrong, and in the position of offenders suing for pardon up to the firing of the shot at any rate, were, on Sawan Singh's own showing, most reluctant to report the matter to the police. Sawan Singh, *Lambardar*, whose incredible story has been held to be full of falsehoods although he was bound to do so, never reported the matter him-

self, and the Biloches were only too anxious to compromise, indeed did so, though this was not permitted by the Court who held the offence to be non-compoundable. Here I must remark that it is a Magistrate's duty to draw a charge in accordance with the offence disclosed and not to consider such questions as whether he himself has or has not jurisdiction to try the offence, or whether a particular charge will or will not require a committal to the Sessions. In drawing a charge there is one consideration and one only to be entertained, and that is, what is the offence disclosed? The result has been that in this case the learned Sessions Judge has convicted the accused under section 308, Indian Penal Code, for which the Magistrate was not competent to try him, and, as is admitted by the learned Government Advocate, this would necessitate under any circumstances that the case should be sent back for retrial, if this Court considered that the conviction should not be set aside.

The evidence on which the accused has been convicted is mainly that of Sawan Singh and two or three other villagers for the First Court remarks that the Biloches having something to gain by compromise and none by conviction, are not to be trusted and "We must depend on Sawan Singh, etc., who have nothing to gain by compromise" are the words of the Magistrate. Sawan Singh is a witness quite unworthy of credit. His statement that he was present at all appears to me to be of extremely doubtful veracity. In fact he is in my opinion quite untruthful and unreliable. I have been also carefully through the evidence of each of the witnesses and the Police file—and though ordinarily loth to interfere with a concurrent finding of fact by two Courts, in this case those findings are so much based on assumptions, and in some cases clearly assumptions not justified by the facts, that I feel bound in this case to do so. I do not think that the evidence of the prosecution in favour of their account of the transaction justified the conviction of the accused, the evidence of whose wit-

nesses again is at least fully as reliable as that of those for the prosecution on whom the onus lay, and who have failed to prove their case. There are, I may remark, many glaring discrepancies between the evidence of Sawan Singh and his co-villagers and that of the Biloches, *inter alia* the statement of the latter in flat contradiction to that of the former that when Khattar fell down and was placed under a tree and water fetched for him, *no one* but Biloches were present, and that *no* villagers appeared for an hour after the departure of the tonga. The First Court considered that the Biloches were not speaking truly in order to further a compromise which had been already rejected, but we must convict an accused on the evidence before us, and not on what we think the witnesses have left out, or might have said. No doubt it is often extremely annoying to find witnesses telling what we think a palpably false story, but we cannot assume that they could or should have said something else, and convict an accused on what we think they ought to have said. This is to some extent I fear what has been done in this case. We must however take the evidence of Sawan Singh and others and that of the Biloches as it stands on the file, and as it stands I hold it quite insufficient to justify the conviction of the accused.

It has been considered to tell much against the accused that he did not report the case in Amritsar at once and has been held impossible that he did not know whether any one was struck or not when he fired. Here again I must entirely dissent from the views expressed. If, as is the deduction to be drawn from the defence, it is true that the shot was fired from the tonga, and upon that shot, as would naturally occur *all* the Biloches fell back from the pony whose progress they were interrupting, it is certainly not contrary to human nature that a man who rightly or wrongly believed himself in danger should whip up his horse and gallop on without waiting to enquire the effect of his shot. The Magistrate assumes that the man hit must

have fallen at once; but unfortunately for this assumption all the evidence is dead against it and Sawan Singh himself says that the man went on for 40 or 50 *karams*, and in face of all the accounts coming from South Africa of the entirely unexpected effects of wounds it is not safe to dogmatize from preconceived views as to what "must have occurred," when such views are not supported even by the medical or other evidence on the file. The accused gave the explanation that he did not report because believing no one was hurt, he did not wish his wife or himself to be dragged into Court, an explanation not in itself unlikely. It is suggested with great force further that if he had known that he had shot a man the first thing he would have done would have been to secure that his was the first account to go in. If he really knew that a man was shot how could he hope that nothing more would be heard of it, and would he not immediately report his own version. There appears to me to be much force in this argument of Counsel and that it was not given proper weight to.

After giving this case very full consideration, I have come to the conclusion that the evidence on the file shows that Mr. Mukerji certainly had his pony stopped while he was in the execution of his duty, that he was violently importuned and if not actually attacked was put in fear of attack, that his prisoner most certainly escaped in consequence of the altercation if not as Khattar said, actually released by Khattar, that Mr. Mukerji was in reasonable apprehension of a wholly unjustifiable attack upon him, and that he either fired off his gun in the confusion by accident, or with no definite aim, or that he fired, after warning them to desist, at the Biloches who were acting illegally, for even if it went no further the forcible arrest of his progress was illegal; he fired at them under the reasonable impression that he was about to be attacked and that if he did not use the gun which was lying ready to hand and which he did not deliberately seek or obtain for the purpose,

a fact which has also not received the consideration it deserved, he would be attacked. I agree with the view of the Lower Courts that the hurt was technically grievous owing to the perforation of the shoulder blade. The evidence of the Civil Surgeon makes it most probable that the bullet did not traverse the lung and the same evidence shows that Khatter's life was never in danger.

Finding therefore as I do that the case for the prosecution has not been proved, which is the only question, its inherent improbability, though great, being a subordinate factor, I have now to consider whether any offence has been committed at all, and if so, what that offence is. The conviction under section 308 would have to be set aside on technical grounds, but it is clearly inapplicable. It was suggested by learned Counsel for the defence that the subordinate Courts in general seem to forget altogether the existence of such sections as section 98-99,100, 101 *et seq*, Indian Penal Code, 334, Indian Penal Code and section 46 *et seq* of the Criminal Procedure Code, and to ignore the right of private defence altogether. In this view I cannot entirely concur but that they are too often overlooked and are very timidly applied is probably correct. In this case it appears to me clear that the accused had every reason to believe that he was about to be subjected to personal violence, that his carriage had been stopped and that the Biloches refused to abate the restraint, in itself a criminal offence, that in the scuffle a person properly under arrest was either directly released or enabled to escape, and that the accused either let off his gun by accident, which is less probable, or that he fired it off without any careful aim at his assailants to secure his own safety which is possibly more probable. Under these circumstances he is entitled to an acquittal. If the gun went off by accident, there was of course no offence, if he fired it under the circumstances noted above he comes under section 101, Indian Penal

Code, and is also entitled to an acquittal. I accordingly quash the conviction, acquit the prisoner and set aside the sentence. The accused will be discharged from his bail.

This disposes of the application for enhancement, in regard to which however I wish to offer a remark. The application on the facts as found by the Lower Courts appears to have been fully called for. If I had been able to hold the charge proved, *i. e.*, that accused had deliberately shot Khattar in the back I should in all probability have felt constrained to have materially enhanced the sentence, and I cannot understand on what grounds the Lower Appellate Court reduced the sentence from one year to nine months. The sentence passed would have been of course still more inadequate had the charge of firing twice been sustained. As however I have felt obliged to take a different view of the facts, the application must be dismissed.

REVISON SIDE. No. 52.

FULL BENCH.

Before Hon'ble Mr. Justice Clark, Chief Judge, Hon'ble Mr. Justice Chatterji, and Hon'ble Mr. Justice Maude.

BHAGWAN SINGH, and others,—PETITIONERS,

Versus

THE EMPRESS OF INDIA,—RESPONDENT.

Case No. 740 of 1900.

Penal Code 1860, Sections 71, 147 and 325—Separate sentences—Rioting and grievous hurt.

Where the offence of rioting has not been completed until the grievous hurt has been caused, or, in other words, where the causing of the grievous hurt is itself the form of force or violence, which, (with other circumstances), constitutes the offence of rioting, separate sentences cannot be legally imposed, and this is the case not only as regards those persons who do not actually cause the hurt but also as regards the actual causer of it.

Separate sentences are not necessarily illegal where it is found that the accused individually did not commit any act amounting to voluntarily causing hurt but was guilty of that offence under section 149, Indian Penal Code.

In a case in which after the offence of rioting has been fully established, owing to the use of force, or violence and all the members of the unlawful assembly have been rendered liable for that offence, one or more persons proceed to further acts of violence, such as causing grievous hurt, those who remain members of the unlawful assembly during the later phases are guilty of committing grievous hurt in addition to the previously completed offence of rioting and can be punished separately for each offence. Each case must be decided with reference to its special facts—*I. L. R., 16 Cal., 442, followed.*

Petition for revision under section 439 of the Criminal Procedure Code, of the order of Rai Bahadur Lala Buta Mal, Sessions Judge, Lahore Division, dated the 31st May 1900, upholding the order of S. S. Harris, Esquire, Magistrate 1st class, Lahore, dated the 18th May 1900, convicting the petitioners.

Mr. Gunpat Rai, Advocate, for petitioner.

The case was referred to a Bench by the following order.

Maude, J.—In this case five persons were convicted under section 147, Indian Penal Code, and one of the five, Bhagwan Singh, was also convicted under section 325, Indian Penal Code; the remaining four were convicted under section 149, Indian Penal Code, and also held to be guilty of causing grievous hurt. Each of the five accused was sentenced, under Section 147, Indian Penal Code, to six months' rigorous imprisonment, and under section 325, Indian Penal Code, to a similar term, and to Rs. 105. Their appeals were rejected by the Sessions Judge. *26th July 1900*

In applying for revision of the Magistrate's order it has been contended that the two sentences passed on the four persons, other than Bhagwan Singh, cannot be maintained, and in support of this contention reference has been made to the case of *Nilmony Poddar and others versus Queen Empress*,* in which it was held by a majority of the Full Bench of the Calcutta High Court that separate sentences passed upon persons for the offences of

* *I. L. R., XVI Cal., p. 442.*

rioting and grievous hurt are not legal where it is found that such persons individually did not commit any act which amounted to voluntarily causing hurt, but were guilty of that offence under section 149, Indian Penal Code. The point does not appear to have been decided in any of the reported judgments of this Court, and as the question is not without importance, I refer it to a Bench for consideration.

The Bench (Maude and Chatterji, JJ.) referred the case to a Full Bench by the order given below.

15*th Augt.* 1900. MAUDE, J.—The order dated July 26th 1900, admitting this case to a Division Bench may be referred to. The question therein stated is almost similar to one examined by Sir Meredyth Plowden in the case of *Nur Khan and others* versus *Queen Empress* (*P. R.*, 31 *of* 1894). There, Nur Khan was not found to have himself caused injury to any person, while his five co-accused had caused either death or hurt, and the main question before the learned Sessions Judge was whether those five could be convicted both under section 147 and section 325, Indian Penal Code. As regards Nur Khan the unexpired portion of the sentence of imprisonment under section 325 was remitted, but it was not held that the sentence under that section was illegal.

There is considerable difference of opinion among the decisions of the High Courts, the Calcutta Court holding the view cited in the order of July 26th, while in the case of *Queen Empress* versus *Ram Sarup and others* (*I. L. R., VII.*, page 757) a Full Bench of the Allahabad High Court arrived at an opposite conclusion.

We think that the question is sufficiently important to be considered by a Full Bench of this Court, and we accordingly refer the following point, can separate sentences under section 147, Indian Penal Code, and under section 325 be legally awarded to persons for the offences of rioting and voluntarily causing grievous hurt, when such hurt has been caused not by those persons but by others who also committed the offence of rioting.

Judgment of the Full Bench (Clark, Chatterji and Maude JJ.)

Maude, J.—This reference has arisen out of a case in which it was found that five persons had lain in wait armed with sticks in order to attack the complainant and that one of those persons had caused grievous hurt to him by breaking his arm. Convicting all five accused persons the Magistrate awarded the actual causer of the hurt separate sentences under section 147 and section 325 of the Indian Penal Code, and other four persons separate sentences under section 147 and section 325 read with section 149. This order was upheld in appeal by the Sessions Judge. *23rd Novr.* 1900.

The question referred for the decision of the Full Bench was as follows: Can separate sentences under section 147, Indian Penal Code, and under section 325 be legally awarded to persons for the offences of rioting and of voluntarily causing grievous hurt, when such hurt has been caused not by those persons but by others who also committed the offence of rioting.

We are of opinion that no general answer to the question can be given which will equally apply to all cases which may arise. Where the offence of rioting has not been completed until the grievous hurt has been caused, or in other words where the causing of the grievous hurt is itself the form of force or violence which (with other circumstances) constitutes the offence of rioting, we are clearly of opinion that separate sentences cannot be legally imposed, and this would be the case not only as regards those persons who did not actually cause the hurt but also as regards the actual causer of it. But we are not prepared to go so far as to hold as a general proposition that separate sentences passed upon persons for the offences of rioting and grievous hurt are necessarily illegal where it is found that such persons individually did not commit any act amounting to voluntarily causing hurt, but were guilty of that offence under section 149 of the Penal Code.

That view appears to have been accepted by a Full Bench of the Calcutta High Conrt (*Tottenham J.*, dissenting) in the case of *Nilmony Poddar and others* versus *Queen Empress*, (1) and no doubt in many cases separate sentences would be illegal, but it seems to us quite possible that cases may occur in which after the offence of rioting has been fully established, owing to the use of force or violence, and all the members of the unlawful assembly have been rendered liable for that offence, one or more persons may proceed to further acts of violence such as causing grievous hurt or homicide, and we do not see why others who remain members of the unlawful assembly, during the later phases, may not also be held guilty of committing the subsequent offences in addition to the previously completed offence of rioting, and be punished separately for each offence. Each case however must be decided with reference to its own special facts, and it appears to us impossible to lay down any general rule. What has to be decided in each case is whether the first clause of section 71 of the Penal Code applies or not: if it applies, and the offence committed is made up of parts, any of which parts is itself an offence, then the offender "shall not be punished with the punishment of more than one of such of his offences, unless it be so expressly provided." For example, if a member of an unlawful assembly pushes a man, then strikes him causing hurt, and then deals a heavier blow fracturing his arm, section 71 would operate and the offender could not be separately punished for rioting, assault, voluntarily causing simple hurt, and causing grievous hurt; and similarly of course separate sentences could not be awarded to other members of the assembly found guilty of those offences in virtue of section 149. But section 149 of the Penal Code covers a wide area, and applies when any offence is committed by one member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of

(1) *I. L. R., XVI Cal.* 442.

it know to be likely to be committed in prosecution of that object, and not only offences affecting the human body, but others such as mischief or theft might be committed, and where distinct offences not made up of parts are proved to have been committed, we see no reason why separate sentences may not be awarded, whether the offences affect the human body or not. In practice, however, we consider that the most convenient course is for the Court to pass one sentence for the most serious offence of which the accused person is found guilty, provided that adequate punishment can be given to the offender for his share in the occurrence. In the case which has given rise to this reference, a 1st class Magistrate awarded two sentences each of six months' rigorous imprisonment under sections 147 and 325, Indian Penal Code, a procedure which was quite unnecessary as a sentence of one year's imprisonment could have been passed under either section.

Final judgment of the Bench.

MAUDE, J.—In view of the opinion recorded by the Full Bench, as we hold that there is some doubt whether the offence of rioting was completed irrespective of the grievous hurt caused to the complainant, we set aside the sentences passed on each of the five petitioners under section 147, Indian Penal Code, and confirm those passed under section 325. *23rd Novr.* 1900.

APPELLATE SIDE. No. 53.

Before Hon'ble Mr. Harris.

TEKA,—(DEFENDANT),—APPELLANT,

Versus

SOHNU and others,—(PLAINTIFFS)—RESPONDENTS.

Case No. 1254 of 1900.

Limitation Act (Punjab) I of 1900—Retrospective effect.

The plaintiffs sued on the 7th July 1900 as reversioners of one Dadu, a sonless proprietor, to have an alienation made

in 1889 by Dadu of ancestral land declared void as against their reversionary interest.

Held, that the claim was barred by limitation under article 120 of Act XV of 1877.

The effect of the Punjab Limitation Act is generally to lessen the period for a possessory suit while extending that allowed for a declaratory suit, but a right to sue which is barred under the previous law of limitation is not revived by Punjab Limitation Act, Article 120 of Act XV of 1877, is repealed by Punjab Limitation Act so far as declaratory suits provided for by Punjab Limitation Act are concerned. *L. R.* 15 *I A.* 167 *and L. R.* 20 *I. A. at p.* 38, *followed.*

Section 6 of Act XV of 1877 so far as it relates to a future special or local law does not go further than providing against a conflict between two prescribed and existing periods. It would not seem to apply to a period which under the provisions of the general law has ceased to exist, for where that has happened there is no longer any danger of conflict.

The operation of a statute of limitation is generally retrospective, but the retrospective effect of limitation law does not extend to rights already acquired or extinguished when that law comes into force.

The principle that in cases where only the remedy is barred and the right is not extinguished the period is revived under the new law has been evolved in cases of debt but has not been applied to rights in immoveable property.

Miscellaneous further appeal from the order of S. Clifford, Esquire, Divisional Judge, Hoshiarpur Division, dated the 24th October 1900, *reversing the order of F. Yewdall, Esquire, District Judge, Kangra, at Dharmsala, dated the 27th August* 1900, *dismissing plaintiffs' suit with costs, and remanding the case under section* 562, *Civil Procedure Code.*

Lala Sukh Dyal, Pleader, for appellant.

Bakhski Sohan Lal, Pleader, for respondent.

JUDGMENT.

22nd Feby. 1901 Harris, J.—Plaintiffs sued on the 7th July 1900, as reversioners of Dadu, a sonless proprietor, to have

an alienation made in 1889 by Dadu of ancestral land declared void as against their reversionary interest.

The First Court dismissed the claim as time-barred under article 120, schedule II, Act XV of 1877.

The Divisional Judge on appeal held that the right to sue, which was barred under Act XV of 1877 when the suit was instituted, was revived by the operation of the Punjab Limitation Act, (I of 1900) which was in force at date of institution of suit, and remanded the cause under section 562, Civil Procedure Code, for trial on the merits.

This appeal is from the order of the Divisional Judge remanding the cause. The merits of the preliminary point have to be decided.

The reasons given by the Divisional Judge for his conclusion are (*i*) that section 2, Act XV of 1877 as to non-revival of right to sue is "not made applicable" by the Punjab Act, and (*ii*) that the Punjab Act did not contemplate validating all alienations like the one in question "at one sweep".

With regards to the first reason it is, I consider plain, that section 2 of Act XV of 1877 could not be made applicable to the Punjab Act as that section only provides for specific enactments. There is no force in the argument that only sections 5 to 25 of Act XV of 1877 are by section 2 of the Punjab Act to apply, for section 2 of the Punjab Act is so far merely a re-draft of part of section 4 of Act XV of 1877 as will be seen by a perusal of the two sections.

But what the Divisional Judge wished no doubt to express was that in the absence of express provision the right to sue is revived, as is evident from the tenor of his second reason based upon the imagined intention of the Local Legislative Council.

The effect of the Punjab Act is generally to lessen the period for a possessory suit while extending that allowed for a declaratory suit, and to my mind an

intention to revive a right to sue which under the previous law of limitation is barred is not deducible therefrom.

No anthorities have been cited by the Divisional Judge in support of his view and indeed on the particular point whether in the absence of express provision the right to sue is revived, the authorities appear opposed to that view. Thus the Limitation Act IX of 1871 contained no provision as to the effect of the previous Limitation Act of 1859, but it has been held, that a right to sue barred under the earlier Act was not revived by the Act of 1871. (See 12 *Mad.*, 26 *at* p. 33, I *Cal.*, 328; 3 *Cal.*, 331; 4 *Bom.*, 231; *P. R.*, 85 *of* 1880, *followed* in *P. R.*, 157 *of* 1888).

In support of the order of the Divisional Judge it is here urged (1) that the provisions of section 6, Act XV of 1877 as to future local law exclude the application of the shorter period prescribed by that Act, (2) that a new limitation law like a new law of procedure has retrospective effect, (3) that the rulings as to the effect of repealing Acts of limitation are not here applicable as there has been no repeal, (4) that even if a declaratory suit is barred under Act XV of 1877, it is only one remedy which is barred, the reversionary right with right to sue for possession still subsisting.

As to the first contention, I do not understand section 6 of Act XV of 1877, so far as it relates to a future special or local law and affects the present case, to do more than provide against a conflict between two prescribed and existing periods. It would not seem to apply to a period which under the provisions of the general law has ceased to exist for where that has happened there is no longer any danger of conflict. The further question, whether section 6 covers provisions of the general law of limitation other than those prescribing periods does not appear to touch the point here under discussion.

On the second contention are cited 18 *Bom.*, 429 and 19 *Bom.*, 204. No doubt the operation of a statute of

limitation is generally retrospective. But the retrospective effect of limitation law does not extend to rights already acquired or extinguished when that law comes into force (6 *Bom.*, 26).

The third contention seems to me futile. The terms of the preamble to the Punjab Act and the absence of any direct repealing *schedule* are explained, so far as declaratory suits of a particular kind are concerned, by the fact that article 120 of Act XV of 1877 is of a general nature and the words "and notwithstanding anything to the contrary in the second schedule of the same Act contained" which occur in section 2 of the Punjab Act preclude the application of article 120 to those suits, and so far repeal it. Moreover this contention will not serve respondent. If there has been no repeal the suit is clearly time-barred.

As to the fourth contention. It is true that only one remedy would be barred under Act XV of 1877 and that the reversionary right is not wholly extinguished, the possessory suit in the event of the alienor's death remaining. But that barred remedy is the right to sue for a declaratory decree which is the right claimed in the present case and that right to sue was extinguished before the Punjab Act came into force.

The principle that in cases where only the remedy is barred and the right is not extinguished the period is revived under the new law has been evolved in cases of debt, but has not been applied to rights in immoveable property. Here I fail to see how a possible right to sue for possession revives the right to sue for a declaration.

That a new limitation law will not revive a barred right has been laid down by the Privy Council (*L. R.*, 15 *I. A.* 167) cited with approval in *L. R.* 20 *I. A.* at *p.* 38 and by the High Courts in this country several of whose rulings have been already cited on this point.

For the above reasons I hold the Punjab Act did not revive the barred right to sue for a declaration and

that the First Court rightly dismissed the claim as time-barred. I set aside the order of the Divisional Judge and restore the order of the First Court dismissing the claim.

Plaintiffs will bear all costs throughout.

Appeal accepted.

REVISION SIDE. **No. 54.**

Before C. L. Tupper, Esq re, Financial Commissioner.

ROSHAN, son of KHAIL Arain of Mauza Alwalpur, Tahsil G shankar, }—(PLAINTIFF)— APPLICANT,

ersus

POHU, son of JAI SINGH, Jat, of the same place. }—(DEFENDANT)— (OTHER SIDE).

Case No. 266 of 1899 1900

Landlord and tenant—Occupancy rights—Alluvion and diluvion—Abandonment.

Held, that the general rule in the Punjab is that an occupancy tenant does not lose his right by reason of the land f his holding being sub-merged; a custom to the contrary may be proved, but such a custom is plainly inequitable and very strict proof of it should be required before it is acted upon. *Held*, that a custom contrary to the general rule was not found to exist in respect of lands in Alwalpur village in the Hushiarpur District but it was proved that the tenants had abandoned their occupancy rights by failing to cultivate the tenancy without sufficient cause for more than one year. *P. R.*, 19 *of* 1883, 122 *of* 1876, 59 *of* 1877, 96 and 127 *of* 1879 *and* 152 *of* 1888, *followed.*

Application for revision against the order of S. D. Butler, Esquire, Collector of Hushiarpur, dated the 22nd May 1900, confirming the order of S. Aziz-ud-Din Ahmad, Assistant Collector, 1st class, Hushiarpur, dated the 9th May 1899, dismissing plaintiff's claim.

ORDER.

31st Decr. 1900. The Financial Commissioner.—The plaintiffs who are the recorded occupancy tenants, claim half the price of *moonj* and *kharkana* alleged to have been taken by the landlord,

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